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No. 00-391

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

vs.

ROBERT A. THOMAS,

Respondent.

On Writ Of Certiorari
To The Florida Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether this Court's holding in *New York v. Belton*, 453 U.S. 454 (1981), extends to a situation in which the first contact the defendant has with the officer occurs after he has voluntarily exited the vehicle.

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STATEMENT OF THE CASE

On February 28, 1997, Detective J.D. Maney of the Polk County Sheriff's Office went to the residence of Mr. and Mrs. Crall on information that marijuana was being sold from the residence. (JA-22, 23) Maney obtained consent to search the residence and marijuana was eventually found inside.[1] (JA-28-31) After Mrs. Crall was arrested and handcuffed, four or five narcotics detectives arrived, and Maney went outside and sat in his patrol car. (JA-21, 115)

While Maney was in his patrol car, the respondent, Robert Thomas, drove up to the house, parked his car in the driveway, and got out. (JA-115-116) As Mr. Thomas walked toward the rear of the car, Maney got out of his vehicle and met Mr. Thomas at the rear passenger side of the car. (R116, 118) Maney asked Mr. Thomas his name and whether he had a driver's license. (JA-116) He admitted he could not demand identification because Mr. Thomas "hadn't done anything wrong." (JA-116) During the conversation with Mr. Thomas, Maney had no suspicion that there were narcotics in the car. (JA-116, 119)

A driver's license check revealed an outstanding warrant for probation violation. (JA-115, 136) Maney arrested Mr. Thomas, handcuffed him, and escorted him inside the residence where he remained with the narcotics detectives. (JA-120) Maney returned to the car and searched it, discovering illegal narcotics in the glove box

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[1] Evidence seized from the house was suppressed by the trial judge because he found the officers "lacking in credibility," and also because he found their actions "abhorrent." (JA-113)

and in a pocket in the driver's door. (JA-117) Five minutes elapsed between the time that Mr. Thomas exited his car until Maney searched the car. (R118)

Mr. Thomas was charged with possession of methamphetamine. Before trial, he moved to suppress the evidence seized during the search of the car. The circuit court granted Mr. Thomas' motion. (JA-128-129) The Second District Court of Appeal reversed, concluding that "a defendant does not have to be in the vehicle at the time of the arrest and subsequent search in order for the search to be valid under *Belton*." (JA-132) Because there was no evidence that respondent's arrest was a preplanned pretext to conduct a warrantless search of his car, the court ruled that "the bright-line test in *Belton* applies" even though Mr. Thomas was outside of this vehicle when arrested. (JA-133)

The Florida Supreme Court reversed the decision of the Second District. (JA-135-45); *Thomas v. State*, 761 So.2d 1010 (Fla. 1999). After recognizing that *Belton* established "a bright-line rule to be applied in all cases" where the occupant of an automobile is arrested, the court explained that when a search extends beyond *Belton*'s "original parameters, the bright-line rule is not automatically invoked." (JA-141) The court adopted the reasoning of *United States v. Hudgins*, 52 F.3d 115 (6th Cir. 1995), holding that *Belton*'s *per se* rule is confined to "situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signalling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile." (JA-142-43)

Applying this standard to the facts, the Florida Supreme Court ruled that *Belton* did not apply because Mr. Thomas did not exit the vehicle upon the direction of Detective Maney. (JA-143) The court remanded the case to the trial court to decide whether the search of the vehicle could be upheld as a valid search incident to arrest pursuant to *Chimel v. California*, 395 U.S. 752 (1969).

SUMMARY OF THE ARGUMENT

The petitioner failed to prove that the search of the respondent's vehicle fell within the search incident to arrest exception described in *New York v. Belton*, 453 U.S. 454 (1981), which allows the automatic search of the entire passenger compartment of a vehicle pursuant to the arrest of an "occupant" of that vehicle. In this case, the officer did not initiate contact with the respondent until after he had pulled up into the driveway of a residence, got out of the car, and walked to the rear passenger side. It was not until his arrest on a warrant for probation violation that the officer had authority to seize him. The *per se* rule of *Belton* requires the arrest of the "occupant" of a vehicle. Since Roger Belton was a passenger in the car during the traffic stop, and an occupant of the car when probable cause to arrest arose, it can be assumed that the definition of "occupancy" is restricted to these facts. This case is not controlled by *Belton* because the respondent was not the occupant of the vehicle when the officer confronted him.

Although a search incident to arrest is a recognized exception to the Fourth Amendment warrant requirement, the exception is meant to prevent the arrestee from gaining possession of a weapon or destructible evidence *during an arrest*. It is not meant to prevent concealment of evidence prior to arrest. The Florida Supreme Court's holding below which limits the *per se* rule of *Belton* to situations in which the officer has actually confronted or signaled confrontation with the defendant while he is still inside the vehicle, provides a simple standard for officers in the field and trial judges who review their actions. Although the standard pronounced by the court actually extends the application of the *Belton* rule beyond the facts presented therein, the holding is logically tied to the supporting rationales which justify the exception. Since initiation of contact is the pivotal event which commences the encounter which leads to arrest, it is logical to apply the *per se* rule from that moment forward. However, it is neither reasonable nor constitutional for an officer to search a vehicle when the arrestee has voluntarily moved the epicenter of his "grabbing area" to a point outside the vehicle before the officer initiates contact.

The petitioner has also failed to show that the automatic search of the respondent's vehicle was reasonable in this case. Before the respondent got out of the car, he had not committed any crime or traffic infraction, and he was not suspected of any crime. He moved to the rear passenger side of the vehicle and produced identification although he was not compelled to do so. A warrants check revealed a warrant for probation violation – a

crime unrelated to the operation of the vehicle. The officer then escorted the respondent to the house in handcuffs where he remained with at least four other officers during the search. No weapons or contraband were found on the respondent's person, and there were no other people in the car or near the car during the encounter.

For these reasons, this Court should decline the invitation to extend the *Belton* principle beyond its constitutional underpinnings to allow the search of the respondent's vehicle.

ARGUMENT

WHETHER THIS COURT'S HOLDING IN *BELTON* EXTENDS TO A SITUATION IN WHICH THE FIRST CONTACT THE DEFENDANT HAS WITH THE OFFICER OCCURS AFTER HE HAS VOLUNTARILY EXITED THE VEHICLE.

This case began as a consensual encounter initiated by the deputy after Mr. Thomas had voluntarily stepped out of the car, closed the door, and walked to an area behind the car on the passenger side. (JA-115-118) The search of the automobile that followed cannot be justified as an automatic search incident to arrest under *New York v. Belton*, 453 U.S. 454 (1981), because Mr. Thomas was a pedestrian and not the "occupant" of the vehicle when the officer first approached and asked to speak to him.

Belton does not authorize the search of a citizen's car simply because he has been arrested. *Belton* only allows the search of an "occupant's" vehicle pursuant to arrest, just as *Chimel v. California*, 395 U.S. 752 (1969), allows a

limited search of the grabbing area in a home only if an individual is arrested inside the home. As an aid to the officer in the field, *Belton* simply allows the officer to assume that if an occupant of a vehicle is arrested, the entire passenger compartment of the vehicle (and closed containers therein) are within the arrestee's actual reach. Because the police stopped the vehicle in which Belton was riding and then ordered him out of the car to effectuate the arrest, it follows that in order to be an occupant, an officer has to initiate contact with the arrestee while he is still inside the vehicle. Because Mr. Thomas was outside of the car before the officer initiated contact, *Belton* is not applicable.

A. *Belton* applies the grabbing area defined in *Chimel* to automobile searches.

In *Chimel*, the Court clarified the constitutional scope of a search conducted without a warrant incident to a lawful arrest. In *Chimel*, officers obtained a warrant for the defendant's arrest for burglary of a coin shop. The defendant's wife let the officers into their home to wait for the defendant. When he entered the home, the officers served the warrant and asked if they could "look around." Chimel objected and the officers informed him that based on the arrest they would conduct a search. The officers then looked through the entire three-bedroom house, including the attic, garage and a small workshop looking for evidence. During the search, the officers seized coins and other objects which linked Chimel to the burglary. *Id.* at 753-54.

The *Chimel* Court overruled two cases: *United States v. Rabinowitz*, 339 U.S. 56 (1950),[2] which sanctioned the search of an entire one-room office pursuant to the arrest of Rabinowitz in it, and *Harris v. United States*, 331 U.S. 145 (1947), which upheld the search of a four-room apartment. In holding that the search of Chimel's house had no constitutional justification, *Chimel* limited the scope of a search incident to arrest. The Court held that pursuant to a lawful arrest, the arresting officer may search the person arrested and the area within his "immediate control," meaning the "area into which an arrestee might reach in order to grab a weapon or evidentiary item." *Id.* at 763. The Court found no justification for searching "any room other than that in which an arrest occurs," explaining that "[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items." *Chimel*, 395 U.S. at 766 (footnotes omitted).

New York v. Belton is founded on *Chimel* and does nothing more than define the *Chimel* grab area with regard to the passenger compartment of a vehicle. In *Belton*, an officer in an unmarked car stopped the car in which Belton was a passenger for speeding on the New York Thruway. After requesting documentation, the officer discovered that none of the occupants of the car

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[2] The Court noted that *Rabinowitz* "ha[d] come to stand for the proposition . . . that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested." *Chimel*, 395 U.S. at 760.

owned the car or were related to the owner. Meanwhile, the officer smelled burnt marihuana and noticed an envelope marked "Supergold," a name he associated with marihuana, in plain view on the floor of the car. At that point, the officer directed all of the men to get out of the car, and placed them under arrest. After frisking the men, the officer positioned them in four separate areas of the Thruway so they would not be within touching area of each other. A search of the envelope revealed marihuana. The officer then searched each of the men and the passenger compartment of the car. On the back seat he found a leather jacket belonging to Roger Belton. The officer unzipped one of the pockets and discovered cocaine.

After determining that the principles of *Chimel* had been difficult to apply in specific cases, the court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[3] *Belton* at 460. The *Belton* Court attempted to provide law enforcement officers with a "set of rules" which would make it "possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 458. The Court reasoned that "the articles inside the relatively narrow compass of the

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[3] In *Belton*, the question before the Court was, "When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding?" 453 U. S. at 455. The Court granted certiorari to determine the "permissible scope" of a search. *Id.* at 457.

passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary item." *Id.* at 460.

In reaching its decision, the Court concluded that the search of the passenger compartment was valid even though the arrestees had been taken out of the car because the search followed "immediately upon that arrest." *Belton* at 462. However, the Court warned that the holding applied to the narrow facts before the Court, saying, "Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.* at 460, n.2.

7 "*Belton* sought to avoid the case by case evaluations of whether the defendant's area of control within the automobile extended to the precise place where the policeman found the weapon or evidence." *United States v. Fafowora*, 865 F.2d 362 (D.C. Cir. 1989). The *Belton* rule "effectively exchanged the *Chimel* actual grabbing area for a hypothetical grabbing area when the arrest involves a vehicle occupant." *People v. Stoffle*, 3 Cal.Rtpr.2d 257, 260 (Ct. App. 1991).

It naturally follows that if the holding in *Belton* does not apply to a particular set of facts, a *Chimel* analysis must be applied. *See, Thomas*, 761 So. 2d at 1014; (JA-143); *Fafowora*, 865 F.2d at 362.

B. The *Belton* exception to the warrant requirement applies only when the "occupant" of a vehicle is arrested; however, the *Belton* Court did not define the term "occupant."

"*Belton* does not permit searches of arrestees' vehicles; it permits searches of occupants' vehicles incident to lawful arrest." *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000). "*Belton* clearly limits its application to only those settings where an officer makes a custodial arrest of the 'occupant of an automobile.' " *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993); *Belton*, 453 U.S. at 460. "Therefore, the inquiry mandated by *Belton* is twofold: (i) whether there has been a lawful custodial arrest; and (ii) whether the person arrested was the occupant of the vehicle." *People v. Savedra*, 907 P.2d 596, 598-99 (Colo. 1995). Professor LaFave explains the occupancy requirement:

> . . . [I]t must be emphasized again that *Belton* applies only in the case of 'a lawful custodial arrest of the occupant' of the vehicle. Though some of the post-*Belton* cases fail to give sufficient attention to this limitation, it appears to mean that *Chimel* rather than *Belton* applies whenever the person arrested was not the driver of or a passenger in the vehicle just before the arrest.

3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 7.1(b) (3rd ed. 1996) (footnotes omitted).

The Court did not define the term "occupant" in *Belton*. *See Robb*, 605 N.W.2d at 101.[4] *See Belton* at 456. Because Belton was ordered out of the vehicle after the officer acquired the probable cause necessary to arrest him, the Court did not need to consider whether or not Belton was an "occupant" of the car at the time of arrest. In the case *sub judice* Mr. Thomas had left the car voluntarily before the officer walked over to talk to him. The officer did not remove Mr. Thomas from the vehicle, nor did the officer conduct a traffic stop of his car as had the officer in *Belton*. Also, unlike *Belton*, the officer did not obtain probable cause to arrest Mr. Thomas while he was in the vehicle. For that reason, in deciding whether or not the automatic passenger compartment search was justified under *Belton*, the Florida Supreme Court needed to determine for itself whether or not Mr. Thomas was an "occupant" of the vehicle.

The Petitioner's brief dismisses the fact that the defendant must first be shown to be an "occupant" of the vehicle before a search is justified as an automatic incident to arrest. The underpinning of the Petitioner's argument is that a valid custodial arrest is the only condition required to be met in order to conduct a contemporaneous search of that vehicle incident to that arrest, because the arrest alone triggers a *Belton* search. Petitioner's Brief at 7, 11. In order to reach that conclusion, the Petitioner

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[4] In *Robb*, the court applied *Chimel* instead of *Belton* because the defendant was on a boat on the lake and not near his vehicle when the officer first approached. The fact that he later reached into the vehicle under police supervision to retrieve his license from the dashboard did not convert the defendant into an occupant.

substitutes the words "recent occupant" for "occupant" in applying the holding in *Belton*. Based on that error, the Petitioner concludes that the *Belton* opinion, in and of itself, sanctions the automatic passenger compartment search of all vehicles in all cases in which it can be said that the arrestee had been a "recent occupant" in a temporal or spatial sense. *See* Brief of Petitioner at 5-6.

In *Belton*, the opinion written by Justice Stewart used the words "recent" and "occupant" in conjunction only once, stating:

> While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its *recent occupant*.

Id. at 460 (emphasis added). However, the *Belton* holding does not contain the word "recent." It allows a search of the passenger compartment on the condition that the policeman has first made a lawful custodial arrest "of the occupant of an automobile."[5] *Id.* at 460.

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[5] The term "recent occupant" appears in the dissent written by Justice Brennan. The dissent argued that once "the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel*'s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband." *Id.* at 465-66. Justice Brennan points out that one of the questions unanswered by the opinion is whether or not it matters if "the police formed probable cause to arrest before or after the suspect left his car." *Belton* at 470.

Roger Belton was removed from the vehicle prior to the search, although the search could have taken place with him in it. Common sense dictates that searches generally take place after an individual has been removed from the vehicle. *See* LaFave § 7.1(a), n.15 at 435. It is clear from the opinion, that for purposes of applying the *Belton* rule, an occupant becomes a "recent occupant" at the time of the search only after the officer has directed the arrestee to get out of the vehicle and he is no longer in it.

"The *Belton* Court made it very clear that the bright-line rule enunciated in that case extended only as far as its factual context." *Lewis v. United States*, 632 A.2d 383, 385-86 (D.C. App. 1993). "The Supreme Court's references in *Belton* to a search after the arrestees are no longer in the automobile and to 'recent occupants' of an automobile clearly pertain to occupants who have been removed by the police, which is what occurred in that case." *Lewis*, 632 A.2d at 386, n.6 (internal quotations omitted). For that reason, in context, the term "recent occupant" should only be employed when a court is called upon to determine whether or not the resulting search is reasonably contemporaneous with the arrest.

In *State v. Kelly*, 963 S.W.2d 866, 869 (Ct. App. Tex. 1998), the court explained:

> "We are mindful that the *Belton* rule was crafted in an effort to free officers in the field from making difficult legal decisions during the often-volatile circumstances of an arrest. *See Belton*, 453 U.S. at 458, 101 S.Ct. At 2863. However, *Belton*'s 'bright-line' only eliminated the officer's need to determine what constitutes the

> area within the arrestee's reach when the area includes the interior passenger compartment of a vehicle and the arrestee is its recent occupant: the 'bright-line' test does not address who is a 'recent occupant' for purposes of being subject to a *Belton*-type vehicular search rather than a *Chimel*-type search."

In a concurring opinion in *Glasco v. Commonwealth*, 513 S.E.2d 137, 142 (Va. 1999)[6], Justice Lacy notes that because *Belton* was not actually sitting in the vehicle when arrested, references to a "recent occupant" in *Belton* have been incorporated into the rule itself. Justice Lacy concludes that nevertheless:

> . . . [N]othing in Belton specifically defined what circumstances qualified an arrestee as a "recent occupant."
>
> Consequently, from its inception, application of the so-called "bright-line" *Belton* rule has not provided clear resolution of the search issues in cases with facts that do not mirror the facts in *Belton* or the precise words of the rule. To date, the U.S. Supreme Court has not

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[6] In *Glasco*, an officer suspected that the defendant was driving without a license. He elected to follow the car in lieu of a traffic stop. After the defendant legally parked the car on the street and began to walk toward a house, the officer activated a rear strobe light and called to the defendant. The officer eventually got confirmation of the license suspension. He then arrested the defendant and searched the vehicle. The majority held the search was valid as incident to arrest under *Belton*. In a concurring opinion, two justices concluded that Glasco was not an occupant under *Belton*, but agreed that the search was based on actual probable cause to believe the vehicle contained contraband.

> addressed whether arrestees with these varying types of connections to the vehicle searched are "recent occupants" of the vehicles under *Belton*.

Id. at 142.

Even though it would be inconceivable to search a car with four people still in it, the fact that Belton was standing outside of the car at the time of the search has generated much concern and confusion.[7] Other opinions cited by the petitioner ignore the occupancy requirement altogether, assuming without discussion, that an arrestee is a recent occupant of a vehicle either because the defense did not argue that he was not an occupant of the car, or because the court failed to see a distinction. *See, e.g., United States v. Schecter*, 717 F.2d 864 (3rd Cir. 1983)

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[7] Many courts wrestle with the concept of "recent occupant" when confronted with an arrestee who, although stopped by the police while in the car, has been handcuffed and placed in a patrol car or otherwise removed from the scene before the search. *See, e.g., United States v. White*, 871 F.2d 41 (6th Cir. 1989) (police may search a vehicle incident to arrest even after the arrestee was handcuffed and placed in the back seat of a police cruiser.); *United States v. McLaughlin*, 170 F.3d 889 (9th Cir. 1999) (search of passenger compartment was a "contemporaneous incident of a lawful arrest" after stop for illegally tinted windows, and arrestee was "recent occupant" even though he was on route to jail because search was conducted only 5 minutes after arrestee departed); *Compare United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (search not contemporaneous because it took place 30 to 45 minutes after arrestee was handcuffed and placed in police vehicle). This type of analysis is inevitable (and not supportive of Petitioner's argument) because a warrantless search incident to arrest is not valid if it is "remote in time or place from the arrest." *United States v. Chadwick*, 433 U.S. 1, 14 (1977).

(without discussing whether the defendant could be deemed an occupant, the court applies *Belton* because the officer came upon an accident scene and found the intoxicated defendant stumbling around the vehicle); *United States v. Karlin*, 852 F.2d 968 (7th Cir. 1988) (when the officer arrived, he discovered the defendant on the ground with one foot still inside his van after being captured and dragged out by citizens; court upheld the search of the van incident to arrest without considering the issue of whether or not the defendant was an occupant); *United States v. Bautista*, 731 F.2d 97 (1st Cir. 1984) (without deciding whether or not the defendant was an occupant of the vehicle, the court justifies search of car based on the fact that he was beside an open door and could reach into it). These cases do not aid in the resolution of the issue confronting this Court.

Apart from these cases, are the cases in which the court actually grapples with the issue of occupancy in a situation where the arrestee is encountered outside of the vehicle. In those cases cited in support of Petitioner's argument, the courts have extended the holding in *Belton*, reasoning that because Belton was not inside the vehicle when he was actually arrested or during the search, it is not neccessary that a defendant is in the vehicle when the officer confronts him. *See, e. g., United States v. Snook*, 88 F.3d 605 (8th Cir. 1996) (holding the defendant was an "occupant" of the vehicle because he had just stepped out of it); *Glasco*, 513 S.E.2d at 140 (opinion by the Supreme Court of Virginia upholding the search of a vehicle on the grounds that "the defendant in *Belton* likewise was outside the vehicle when the police officer arrested him and conducted the vehicle search").

These cases exhibit an unacceptably broad interpretation of *Belton*, whereas the Florida Supreme Court's interpretation of *Belton* in this case is appropriately narrow.

C. The Florida Supreme Court adopted the "bright-line" definition of "occupant" developed by the Sixth Circuit which essentially augments the holding of *Belton*.

In this case, the Florida Supreme Court refused to extend the warrant exception created in *Belton* to the search of Mr. Thomas' car because Mr. Thomas was outside of the car before the deputy approached him to ask him his name.[8] The court held that the search of Mr. Thomas' car was not justified under *Belton*, after concluding, "where the defendant has voluntarily exited the automobile and begun walking away from it before the officer has initiated contact with him, the case does not fall within *Belton*'s bright-line rule and a case-by-case analysis of the reasonableness of the search under *Chimel* becomes necessary." *Thomas v. State*, 761 So.2d 1010, 1013 (Fla. 1999), quoting *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993); (JA-142). The *Thomas* court held that *Belton*'s bright-line rule is limited to "situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or signalling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of

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[8] The officer admitted that Mr. Thomas was not suspected of any crime and that he wanted to talk to him to see who he was.

whether the defendant has been removed from or has exited the automobile." *Id.* at 1014, (JA-142-43)

The court decided that the circumstances of Mr. Thomas' arrest were not contemplated by the Court in *Belton*. The court reasoned that "when searches occur beyond the scope of *Belton*'s bright-line intent, the factors in *Chimel* of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful." *Thomas* at 1012-13. (JA-139). Because Mr. Thomas was not an "occupant" of the vehicle, *Chimel* and not *Belton* applies. Based on that conclusion the court remanded the case to the trial court to determine "whether the factors in *Chimel* justify the search of Thomas's vehicle." *Id.* 1014; (JA143).

The *Thomas* holding establishes a "bright-line" rule for officers to use in determining whether or not an arrestee is the occupant of a vehicle. This definition of "occupant" is taken from language in *United States v. Hudgins*, 52 F.3d 115 (6th Cir. 1995),[9] in which the court concluded that if an officer initiates contact with the

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[9] In *Hudgins*, two officers saw Hudgins' car run a stop sign. The officers followed the car until they felt it was safe to conduct a traffic stop. They activated the cruiser's blue lights, stopped the car, and ordered Hudgins out of it. During the stop, Hudgins admitted his license had been suspended. The officers arrested Hudgins, searched and handcuffed him, and placed him in the back of the cruiser. They then searched the passenger compartment of the car and found a loaded pistol, over $3,000 in cash and cocaine. Since the officers initiated contact with Hudgins while he was still an occupant of the vehicle, the court held that *Belton* controlled, and that the search was proper as incident to his arrest.

defendant while he is still in the automobile, a search of the passenger compartment not only falls within *Belton*, but it is also "reasonable." *Hudgins*, 52 F.2d at 119. *Hudgins* cites other Sixth Circuit cases, including *Strahan*, 984 F.2d 155. In *Strahan*, the court held that *Belton* applies only when police initiate contact while the suspect is in the vehicle, *and* subsequently remove him as the officers removed Belton from the vehicle.[10]

The *Hudgins-Strahan* rule adopted by the Florida Supreme Court expands the *Belton* rule in that it allows an automatic search as a contemporaneous incident to arrest even though the officer did not have probable cause to arrest the defendant while he was still inside the vehicle, as did the officer in *Belton*. The rule also allows a search incident to arrest even though the officer's contact began as a consensual encounter as opposed to a traffic stop.

The instant opinion dovetails with *Belton* and actually upholds the bright-line rule in an admittedly difficult area. *See State v. Foster*, 905 P.2d 1032 (Idaho Ct. App. 1995) (concluding that "*Belton* objectives and Fourth Amendment principles are best served by limiting *Belton*'s application to searches of automobiles that were occupied by the defendant at the time of arrest or when the police signalled the driver to stop or when contact between the police and the defendant was otherwise initiated").

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[10] The court held that Strahan was not an occupant because Strahan was 30 feet away from the vehicle at the time of his arrest.

The Petitioner contends that the holding in *Thomas* contradicts statements made by the Court in *Michigan v. Long*, 463 U.S. 1032 (1983), pertaining to *Belton*. Petitioner's Brief at 6. In *Long*, the Court's recitation of the facts leading to the encounter is rather brief and it is unclear whether or not the officers were in active pursuit of Long's vehicle as it was speeding and swerving. *See Long v. People*, 320 N.W.2d 866, 868 (Mich. 1982) (facts below included the information that the officers "turned their vehicle around and pursued the speeding vehicle"). However, it is clear that Long, unlike the respondent, would have been subject to seizure for driving erratically and speeding while still in his car. Nevertheless, the statements in *Long* regarding the hypothetical application of *Belton* had Long been arrested are dicta. A statement of this Court that is dictum does not constitute binding precedent. *Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997).

The "contact" rule has been adopted by other jurisdictions. *See, e.g., Lewis*, 632 A.2d 383 (defendant was not an "occupant" for purposes of *Belton* because the officer approached and met the defendant 15 to 20 feet from the car after he observed defendant operate the car with no front license plate); *United States v. Tobon-Sierra*, 954 F.Supp. 73 (S.D.N.Y. 1997) (the defendant was not an occupant because he left the automobile as DEA agents approached to arrest him); *Foster*, 905 P.2d 1032 (defendant was not an occupant even though he retrieved identification from the trunk of his car because he did not come into contact with narcotics agents until he knocked on the door of a residence).

Other courts have reached the same results in similar situations without reliance on the *Hudgins* rule. *See*

Fafowora, 865 F.2d 360 (agents followed the defendants and arrested them one car length from their vehicle after they had parked and were walking away); *Gibson v. State*, 733 N.E.2d 945 (Ind. Ct. App. 2000) (driver who was walking toward convenience store when officer approached was not the occupant of the van, even though officer followed him intending to arrest him on an outstanding warrant); *United States v. Adams*, 26 F.3d 702 (7th Cir. 1994) (defendant was not an "occupant" of the vehicle even though he was near it and accidently triggered the alarm deactivator during police detention); *Commonwealth v. Santiago*, 575 N.E.2d 350 (Mass. 1991) (officers with warrant to search the defendant's residence and his person were not justified in searching defendant's car parked in front of the residence because he had already left his automobile by the time the officers apprehended him).

D. The *Thomas* definition of "occupant" provides a workable, easily understood and applied guideline which is reasonably related to the legitimate needs of law enforcement.

An officer in the field (or a trial judge evaluating a search) can easily determine whether or not the officer has initiated contact with someone while he is still in a vehicle. Indeed, in most instances, arrests will be the product of vehicle stops in which the officer signals the driver to stop the vehicle by activating his lights and siren or by using a loudspeaker. In other situations, an officer need only determine whether or not he has spoken to, or otherwise signalled to, someone inside a car. If he has done so, and if he then effectuates a custodial arrest,

he may search the car regardless of whether or not the arrestee voluntarily exits the car after contact has begun. In fact, the *Thomas* court warns that *Belton* applies even if the defendant exits the vehicle upon the officer's approach. *Thomas* 761 So.2d at 1013-14; (JA-142). *Accord, State v. Gonzalez*, 487 N.W.2d 567 (Neb. Ct. App. 1992) (after police pursued defendant's car with sirens activated, the defendant pulled over, got out of the car with his hands raised, and walked toward the cruiser). "A hasty exit from the automobile after an officer has initiated contact does not enable a suspect to avoid a search of the passenger compartment incident to arrest." *State v. Harris*, 942 P.2d 568, 572 (Idaho Ct. App. 1997) (officer pursued defendant with lights activated, intending to question him about harassing phone calls, but defendant drove to his house, got out of car and walked toward the house).

The petitioner argues:

> The holding of the Florida Supreme Court represents an unworkable test necessarily involving the subjective impressions of an arrestee which would need to be divined by the courts on a case-by-case basis. This is so because Florida would permit a *Belton* search where the arrestee exited his vehicle only upon perceiving the police presence or, of course, as a direct result of the police officer's request.

Petitioner's Brief at 6. The original opinion issued by the Florida Supreme Court had a very different holding which read, "when a vehicle search is conducted after a defendant has exited a vehicle, we hold that *Belton*'s

bright-line rule is limited to situations where the defendant has exited the vehicle because of the presence or upon the direction of a law enforcement officer."[11] *See* Motion for rehearing filed by Mr. Thomas, Record at 57-61. On motion for rehearing, Mr. Thomas argued, among other things, that it would be impractical for a law enforcement officer to determine the motivation of another individual. Record at 57-61. Consequently, the Florida Supreme Court modified its holding to its present form. The current holding in *Thomas* is clear that as long as the officer has initiated contact, *Belton* applies.[12] It makes no difference if the arrestee has complied or not, or if he even sees the officer.

The petitioner urges this Court to adopt an easy-to-apply "bright-line" rule which would allow a search incident to the arrest of any "recent occupant" of a vehicle. However, the petitioner does not explain how the rule would be a bright-line rule at all. The Petitioner states: "*Belton*'s bright-line rule is not without limits. Indeed,

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[11] The original opinion was withdrawn by the court and was not transmitted with the record.

[12] *Thomas* seems to suggest that if the suspect knows of the presence of the officer, then "contact" has actually been established. *Thomas* at 1014; (JA-142) ("The occupants of a vehicle cannot avoid the consequences of *Belton* merely by stepping outside of the vehicle as the officers approach. *See United States v. Mans*, 999 F.2d 966, 968-69 (6th Cir. 1993) (upholding *Belton* search where officer's first verbal contact with defendant was when defendant was outside of the car on ground that officer had initiated contact with defendant earlier when defendant knew he was being followed by officer")). However, in context, this language must mean the officer must initiate contact.

certain factual situations will present temporal and spatial expansion that will render a search unreasonable. . . . " Petitioner's Brief at 8. However, the petitioner does not offer a definition of "recent occupant" which will explain those limits.[13]

The petitioner's argument overlooks the fact that an officer would have to determine on a case-by-case basis whether or not an arrestee was a "recent occupant" of the vehicle if he does not confront the arrestee while he is still in the vehicle.

> If the rule is stretched to encompass the search of a vehicle that was voluntarily vacated by a person before confrontation with the police began, the "bright-line" rule becomes hazy and uncertain. The police officers would be left to wonder what combination of temporal and spatial proximity the arrestee must have to the vehicle at the time contact was initiated to allow the search without a warrant.

People v. Fernengel, 549 N.W.2d 361, 363 (Mich. Ct App. 1996). In *Foster*, 905 P.2d 1032, the court remarked:

> . . . [E]xtending *Belton* to situations far removed from the facts presented in that case would reintroduce the vagueness and uncertainty that the *Belton* court sought to remove. . . . Any extension beyond the exact limits set by *Belton* would open a new set of temporal and spatial uncertainties, as well as increase the likelihood of

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[13] The *amicus* brief of the Solicitor General concludes that *Belton*'s applicability to "outlying cases" should not concern the Court now. Brief of the United States as *Amicus* at 21, n.7.

> unjustified invasion of the privacy of individuals.

Id. at 1038-39, quoting *United States v. Vaughan*, 718 F.2d 332 (9th Cir. 1983).

The "recent occupant" rule espoused by the petitioner led to the absurd result in *Cason v. Commonwealth*, 530 S.E.2d 920 (Va. Ct. App. 2000), which is cited in support of the petitioner's position. Petitioner's Brief at 12. In *Cason*, the court sanctioned the search of a moped on the grounds that "circumstantial evidence" showed that the juvenile defendant was a recent occupant of the vehicle. The officer did not see the juvenile on the moped. Instead, he saw him emerge from behind a fence with a motorcycle helmet in his hands. The moped which was searched incident to the arrest was found behind the fence in another yard. The court reached the strained conclusion, based on the fact the defendant knew the location of the moped, that he was in "recent possession" of it.

Decisions which consider whether an arrestee was a recent occupant of the vehicle have spawned arbitrary and confusing rules. For example, in *United States v. Sholola*, 124 F.3d 803 (7th Cir. 1997), the court determined the case was governed by *Belton* because the defendant was "positively linked" to the vehicle because he admitted owning it and his key opened the door. However, the officer did not see the defendant driving the car, and there was no evidence regarding when he was last in it. In *United States v. Arango*, 879 F.2d 1501 (7th Cir. 1989), the defendant and a passenger voluntarily left the vehicle as police followed. A conversation with police led to the

defendant's arrest for assault for shoving an officer. The search of the defendant's vehicle was upheld because the officer brought the defendant back to the vicinity of the vehicle to check on the injured officer, placing the defendant "in proximity" to his vehicle. *Id.* at 1506. In *Stoffle*, 3 Cal.Rptr.2d 257, the officer came across two men standing behind a vehicle drinking beer in violation of park rules. In the course of issuing a warning, he discovered an outstanding warrant. The search of the vehicle was upheld because the arrestee had leaned into the car before the officer approached the men. The court established criteria for determining if an arrestee is a recent occupant, saying:

> In that instance there must be circumstances which show the person still had, at the moment of arrest, a close association with the car. Such circumstances exist, for example, where, as here, the arrestee has acknowledged he owns the car, and while staying close to the car continues to have access to it.

Id. at 262. None of these tests would be suitable for accurate application during an arrest situation, and none of these tests provide the certainty the petitioner claims is lacking from the "contact" test.

E. The Petitioner's approach would sever *Belton* from *Chimel* and its Fourth Amendment justification.

The Petitioner argues, "It is constitutionally unnecessary to differentiate between an arrest of a recent occupant who may have exited his vehicle of his own volition and a recent occupant who was initially confronted by a police officer." Petitioner's Brief at 5-6. However, it is this

difference in circumstances which makes the suspicionless search in the instant case unconstitutional.

The search incident to arrest exception is confined to the "immediate vicinity of the arrest." *Shipley v. California* 395 U.S. 818, 819 (1969) (search of the defendant's house was unconstitutional where he was arrested 15 to 20 feet away as he left his car); *Stoner v. California*, 376 U.S. 483, 486 (1964). It does not extend to areas adjacent to the place of arrest. For example, in *Vale v. Louisiana*, 399 U.S. 30 (1970), officers had two warrants for the defendant's arrest. They set up surveillance at his residence and while they were watching, the defendant came out of the residence and made contact with a man inside a car parked outside the residence. The defendant then returned to the house and reappeared a few minutes later and acted as if he were conducting a narcotics transaction. The officers converged and the defendant started back toward the house. The officers arrested Vale on the front steps of the house and took him inside and eventually searched the house. *Id.* at 32.

The Louisiana Supreme Court upheld the search because it occurred "in the immediate vicinity of the arrest" of Vale. The Court reversed, saying: "If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, . . . not somewhere outside – whether two blocks away, twenty feet away, or on the sidewalk near the front steps." *Id.* at 33-34 (Citations omitted). Similarly, a search of an automobile incident to arrest may only occur if it can be said that the arrestee was the actual occupant of the vehicle.

In *Chimel*, the Court explained:

> It is argued in the present case that it is 'reasonable' to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on consideration relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively 'reasonable' to search a man's house when he is arrested on his front lawn – or just down the street – than it is when he happens to be in the house at the time of arrest.

395 U.S. at 764. In *Lewis*, 632 A.2d 383, the court explained:

> To extend the definition of "occupant" to include a person who had parked, locked, and walked fifteen feet away from an automobile before being stopped and arrested, and, therefore, to consider that automobile subject to a warrantless search incident to arrest, would . . . indelibly blur the bright-line rule that the Supreme Court painstakingly drew in *Belton*. . . . Indeed, it would defeat the whole purpose of having a bright-line rule, which, in reality, would be severed, without any limiting principle, from the foundation of its rationale in *Chimel*.

If an arrestee is a pedestrian, and not an occupant of a vehicle when the officer confronts him, then extending the scope of the search incident to arrest to the vehicle

would allow a search that is neither "tied to" nor "justified by" the circumstances of the arrest. *See Chimel*, 395 U.S. at 762, quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

In order for a search incident to arrest to be reasonable as opposed to merely exploratory, it must be grounded in at least one of the rationales for which the exception was created: officer safety or the preservation of evidence. *See McLaughlin*, 170 F.3d at 894 (Trott, J., concurring); *Chimel*, at 768; *Thomas*, 761 So.2d at 1012 (JA-139) ("when searches occur beyond the scope of *Belton*'s bright line intent, the factors in *Chimel* of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful").

When an officer happens upon an individual who is already outside of the vehicle before he initiates contact, neither of these concerns are sufficiently manifest to justify extending the holding in *Belton*. Because the concern for officer safety and the concern for destruction or loss of evidence is not present to the same extent when an officer confronts, and later arrests, an individual who has already left his car voluntarily and is secured away from it, this Court should decline to extend the *Belton* bright-line rule to the search of Mr. Thomas' car. *See Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998) (refusing to extend *Belton* when officer issues a citation in lieu of custodial arrest).

The argument contained in the *amicus* brief of the United States centers around the need to protect officers from weapons that may be hidden inside an automobile. Petitioner argues, in agreement with the United States,

that "investigative detentions involving suspects in vehicles are especially fraught with danger to the police officers."[14] Petitioner's Brief at 7. However, this case does not involve an "investigative detention" of a suspect in a vehicle because Mr. Thomas was not detained in the vehicle. The Petitioner then concludes that searching a non-occupant's car is reasonable for purposes of officer safety because the rationale is present regardless of "who initiated contact with whom." Petitioner's Brief at 5-6, 7. This conclusion is not logical because the epicenter of a suspect's "grabbing area" has been moved to an area outside the car before the officer approaches.

In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court concluded that an individual who is outside of a vehicle poses less of a threat to an officer than an individual inside it. In *Mimms*, the Court was asked to decide the narrow question of whether an officer may order a lawfully detained driver to get out of his car. In

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[14] The Brief of the United States as *Amicus* cites statistics regarding officers killed and assaulted in the line of duty. *Id.* at 8; *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (1998). The statistics lack sufficient detail to allow application to the facts in this case. The statistics do not shed any light on whether or not any of the officers killed in the line of duty were killed in a situation presenting these facts. There are no figures indicating whether or not an arrestee who was outside of a vehicle prior to the confrontation reached into the vehicle to grab a weapon. However, the report does show that of the 682 officers killed between 1989 and 1998, 57 of the officers were slain with their own weapons – not with weapons obtained from vehicles after they were placed under arrest. *See Reports* at 4. This statistic implies that the weapon most readily accessible to a suspect is the weapon carried by the officer himself.

weighing the concern of officer safety the Court observed that there is "an inordinate risk confronting an officer as he approaches a person *seated in an automobile.*" *Id.* at 110 (emphasis added). The court also recognized that "[e]stablishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault." *Id.* In order to reduce the risk posed by persons in the car, the Court held that the practice of ordering a detainee out of a car is reasonable. In *Maryland v. Wilson*, 519 U.S. 408 (1997), out of deference for the safety of the officer, the Court extended the rule to passengers in the vehicle. It follows that if the occupant of a motor vehicle voluntarily leaves a car and distances himself from it before an officer has made contact, the danger to the officer is concomitantly reduced. When that individual is then arrested, he will not be allowed to reenter the vehicle. *Compare Long*, 463 U.S. 1032, 1050-51 (Long posed a danger to police because he was not under arrest and would reenter his vehicle).

Although technically the *Thomas* definition of occupant does expand the *Belton* rule because the arrestee does not have to be stopped by the police or removed from the vehicle, the rule is nevertheless reasonably and logically related to the legitimate need to protect the lives of police officers. The "contact" rule allows the search of the automobile if the officer initiates contact while the arrestee is still inside the vehicle. This makes sense because an officer places himself in danger at the moment he initiates contact with a subject – commencing the

confrontation with the subject and placing himself in proximity to the subject. Therefore, the rule is logically related to one of the justifications underlying the right to search incident to arrest. Because contact is a pivotal act which should trigger the need for a search for weapons, lack of contact should not trigger *Belton*. *See Knowles*, 525 U.S. at 117, 119 (lack of custodial arrest does not trigger *Belton*).

Similarly, an automatic search, without regard to *Chimel* principles, of a non-occupant's vehicle cannot be justified, as the petitioner claims, by the need to secure destructible evidence. First, as explained above, because the person is outside of the automobile at the time of his arrest, he has a severely diminished ability to grab, hide, or destroy evidence inside it.

A more cogent reason the search is not justified, however, is that the search incident to arrest doctrine was meant to curtail an arrestee's ability to conceal or destroy evidence of the crime itself during and after the arrest, it is not meant to curtail the ability of a motorist (or passenger) in a motor vehicle to hide evidence before the arrest occurs. *See Chimel*, at 763 (The area surrounding the arrestee which may be searched is limited to the "area from within which he might gain possession of a weapon or destructible evidence."). *Belton*, 453 U.S. at 465.

The two historical rationales for the "search incident to arrest exception are: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles*, 525 U.S. at 116. The right to search pursuant to arrest is explained in *United States v. Robinson*, 414 U.S. 218 (1973):

> The right without a search warrant contemporaneously to search persons lawfully arrested *while committing crime* and to search the place where the arrest is made in order to find and seize *things connected with the crime* as fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

Robinson at 225 (emphasis added), quoting *Agnello v. United States*, 269 U.S. 20, 30 (1925) (A search of the place where an arrest takes place may be made "in order to find and seize things connected with the crime as its fruits or as the means by which it is committed."); *See also, Preston v. United States*, 376 U.S. 364 (1964) ("The rule allowing contemporaneous searches is justified by the need to . . . prevent the destruction of evidence of the crime.").

When a driver is arrested outside of his car for driving on a suspended license, or on a warrant for an offense unrelated to the car as in this case, it is not logical to conclude that there would be any destructible evidence related to the offense inside the vehicle. In writing for the Court in *Knowles*, Chief Justice Rhenquist observed, "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." *Knowles* at 118.

Even though evidence of unrelated crimes inadvertently found during a valid search pursuant to arrest are admissible against the arrestee, the rationale supporting

the exception is the assumption that there may be evidence of the crime *for which the suspect has been arrested* on his person or within his immediate control. The supporting rationale is not the unfounded hope that evidence of unrelated and undisclosed crimes might be found if an officer is allowed unfettered access to an arrestee's belongings. "[T]he mere ability of a citizen to put evidence out of the reach of law enforcement by placing it within an area protected by the right to privacy is not sufficient to justify a warrantless search." *Glasco*, 513 S.E.2d at 145 (Lacy, J., concurring).

Courts which condone the search of non-occupants' vehicles base their decisions on the perceived need to seize evidence unrelated to the crime for which the arrest is effectuated. For example, in *State v. Wanzek*, 598 N.W.2d 811 (N.D. 1999), the officer pursued Wanzek because he knew her license was suspended. A search of the vehicle revealed marihuana in the glove box. The court rejected the *Hudgins* "contact" requirement reasoning:

> By drawing a distinction between an occupant and a recent occupant of a vehicle, we would encourage individuals to avoid lawful searches of their vehicles as officers approached. . . . Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search. . . . If *Belton* is read to preclude searches where police contact occurs after the suspect exits the vehicle, suspects could conceal evidence and weapons by merely stepping outside the vehicle whenever they saw an officer approaching.

Id. at 815 (citations omitted). In *Glasco*, 513 S.E.2d 137, the court declined to adopt the "contact" requirement for the stated reason that:

> . . . a knowledgeable suspect has the same motive and opportunity to destroy evidence or obtain a weapon as the arrestee with whom a police officer has initiated contact. That suspect could also conceal evidence in the vehicle and effectively prevent an officer from discovering it by getting out of his or her automobile.

Other courts have erected their conclusions on the identical faulty logic. *See, e.g., People v. Bosnak*, 633 N.E.2d 1322, 1326 (Ill. Ct. App. 1994) ("An occupant of an automobile often will have a ready opportunity to destroy or conceal evidence within the passenger compartment before exiting it."); *People v. Savedra*, 907 P.2d 596, 599, 600 (Colo. 1995) ("Prior to police contact, one of the occupants could have chosen to hide something in the vehicle to avoid discovery by the police.").

These statements do not show concern for the officer's safety or with the preservation of evidence relating to the arrest itself *during the arrest*. The language demonstrates a concern that an officer will lose the ability to rummage around in the arrestee's vehicle without a warrant or probable cause looking for evidence of some other (as yet undetected) crime that might have been concealed or destroyed prior to the arrest before the officer made contact.[15]

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[15] As eloquently stated in a dissenting opinion written by Justice Stevens, "The ascendancy of the warrant requirement in our system of justice must not be bullied aside by extravagant claims of necessity. . . . " *California v. Carney*, 471 U.S. 386, 401 (1985).

Again, since initiation of contact is the pivotal event that begins the arrest process, it is reasonable to prevent the destruction of evidence from that point forward. The petitioner's argument missed the fact that the contact rule adopted in *Thomas* would prevent the successful concealment of evidence after contact has been made because it allows an officer to search for that concealed evidence of other crimes as long as he has made contact with the subject while he or she is still in the car.

F. The search of the car Mr. Thomas was driving was not reasonable under the circumstances of this case.

In order to uphold the search in this case, this Court will have to expand the *Belton* exception to the warrant requirement to allow the search incident to arrest of a vehicle somehow linked to a defendant for the purpose of uncovering evidence of an undetected crime which may have been concealed prior to the officer's initiating contact with the defendant. Such an exception would not be reasonable.

Citizens have a reasonable expectation of privacy while in their vehicles. *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).[16] It is a cardinal principle of Fourth Amendment jurisprudence that exceptions to the warrant

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[16] Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day travelling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.

requirement must be "jealously and carefully drawn." *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Furthermore, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). The touchstone of the Court's analysis under the Fourth Amendment is always the reasonableness of the particular governmental invasion of a citizen's personal security. *See Mimms*, 434 U.S. at 108-109.

Even if this Court were willing to adopt some kind of rule allowing the search of an arrestee's motor vehicle because he is a "recent occupant" *per se*, the particular search in this case has to be shown to be reasonable. This the petitioner cannot do. Detective Maney was sitting in his car in front of a residence when Mr. Thomas pulled up and parked in the driveway. Mr. Thomas got out of the car, closed the door and walked to the rear of the vehicle. Maney approached Mr. Thomas and the two met somewhere near the trunk on the passenger side. (JA-118) Although Maney wanted to keep Mr. Thomas from interrupting the arrest of the residents of the house, Maney admitted that Mr. Thomas had not done anything wrong, and that he had no reason to detain him and demand identification. (JA-116)

> Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Prouse, 440 U.S. at 662-663.

In this case there was no connection between the arrest and the operation of the vehicle. Maney was not pursuing Mr. Thomas, Mr. Thomas just happened to be visiting the house and Maney just happened to be parked in front of it. The officer did not have probable cause to arrest Mr. Thomas while he was in the vehicle. Maney did not have reasonable suspicion for a *Terry*-type[17] stop, and for that reason, Mr. Thomas was not "subject to seizure" while he was in the vehicle. *See United States v. Sokolow*, 490 U.S. 1 (1989); *Illinois v. Gates*, 462 U.S. 213 (1983). This was a consensual encounter that uncovered a warrant for probation violation – an offense not related to the operation of the motor vehicle.

Mr. Thomas was polite and cooperative. He gave the officer identification even though not compelled to do so. There is no evidence that Maney thought Mr. Thomas presented a danger to him. No other individuals were in the car with Mr. Thomas, and there is no evidence that anyone else was outside the residence during the encounter.[18] A search of Mr. Thomas' person produced no weapons or contraband. Maney handcuffed Mr. Thomas and took him inside the house before he conducted the

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[17] *Terry v. Ohio*, 392 U.S. 1 (1968).

[18] The Petitioner claims in a footnote that "[i]t is conceivable that, given the right circumstances, one of these nearby 'confederates' might have been able to access the contents of the vehicle Thomas was driving." Petitioner's Brief at 10, n.4. However, the record shows Mrs. Crall had been handcuffed and was inside the residence. (JA-54) There is no evidence which would lead to the conclusion that anyone other than Maney and Mr. Thomas were outside the residence during this encounter.

search. Mr. Thomas never re-entered the car. Although the record does not reveal whether or not the door was locked, the car door was closed. (JA-118)

Maney did not have independent probable cause to believe he would find contraband in the car. *Thomas*, 761 So.2d at 1010; (JA-136). At the time of arrest, it was improbable that there would be any evidence related to a violation of probation in the automobile. *See Knowles*, 525 U.S. at 118-19 (1998). Also, the possibility that Mr. Thomas would destroy evidence of any undetected crime was remote. As the trial judge tersely stated, "the officer did not have probable cause for a warrantless search of the car. There was no valid need or reason to search the vehicle as an incident to this valid arrest." (JA-12)

Because the holding in *Belton* does not extend to the facts of this case and because the search of the vehicle in this case was unreasonable, the opinion of the Florida Supreme Court should be affirmed. To allow the automatic search of a car even though the arrestee is outside of the car at the time the officer decides to initiate contact would sever the *Belton* rule from its roots in the Fourth Amendment and give an officer unfettered authority to search a vehicle simply because someone connected with, or later linked to, that vehicle has been arrested. Such authority is more of an arrest penalty than it is a legitimate search incident to arrest. In addition, determining whether or not an individual is sufficiently connected to the vehicle at the time of arrest to allow a search will require officers in the field to make a spatial and temporal determination on a case-by-case basis during the arrest and destroy the simplicity *Belton* sought to create.

CONCLUSION

The decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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